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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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Arizona Corporation Commission

DOCKETED

JAN 30 2009

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In the matter of:

DOCKET NO. S-20603A-08-0370

Trademark Capital Management, LLC, an
 Arizona limited liability company;

**THE SECURITIES DIVISION'S
 RESPONSE TO RESPONDENTS'
 MOTION TO CONTINUE HEARING**

Blue Investments, LLC, an Arizona limited
 liability company;

**Hearing Dates: February 2, 5, 9, 10, & 11,
 2009**

Travis Richey and Melissa Boyd, Husband and
 Wife;

Respondents.

(Assigned to the Hon. Marc E. Stern)

The Securities Division ("Division") of the Arizona Corporation Commission hereby requests that Respondents' motion to continue the hearing be denied because (1) Respondents caused delays by refusing to fully comply with the Division's administrative subpoena which requested, among other things, Respondents' accounting records¹ and Bank account numbers, (2) The Division is under no obligation to prepare and provide a final written report or document summarizing the possible testimony of the forensic accountant, (3) Respondents have the ability to confront and cross examine the Division's forensic accountant at the hearing, and (4) Respondents have access to the underlying documents (i) directly through their own bank accounts and bank statements and (ii) by reviewing the supporting documentation viewed by the Division's forensic

¹ Division's administrative subpoena dated July 24, 2008 and served August 4, 2008 on Custodian of Records for Blue Investments, LLC; Trademark Capital Management, LLC; and Travis A. Richey, Individually and as a member of Blue Investments, LLC and Trademark Capital Management, LLC, Exhibit "A" #5. "All accounting records and books of original entry including but not limited to, cash receipts journal, cash disbursements journal, sales journals, general journal, subsidiary journals, general ledger, subsidiary ledgers, and chart of accounts;"

1 accountant that relate to the subject matter of his testimony, at the Division's office, which has
2 been available to them since January 9, 2009.

3 **I.**
4 **RESPONDENTS' FAILURE TO FULLY RESPOND TO THE DIVISION'S**
5 **ADMINISTRATIVE SUBPOENA HAS CREATED DELAYS.**

6 On July 24, 2008 the Division filed a Temporary Cease and Desist and Notice of
7 Opportunity for Hearing ("TC&D"). On August 4, 2008 Administrative subpoenas were served on
8 the Custodian of Records for Blue Investments, LLC ("BLUE"), Trademark Capital Management,
9 LLC ("TCM"), and Travis A. Richey ("RICHEY"), Individually and as a member of BLUE and
10 TCM, seeking the accounting records for BLUE and TCM, respectively. In addition, the Division's
11 subpoena requested, among other things, the name of the banking institution and bank account
12 numbers in the name of each Respondent, respectively. To date, no accounting records were
13 produced by Respondents and no bank account numbers were provided. As such, the Division was
14 required to serve administrative subpoenas to on certain financial institutions to obtain
15 Respondents' bank account statements and transactions. On September 25, 2008 the Division
16 mailed a demand letter to Respondents' counsel seeking, among other things, name, address, and
17 related documents detailing Respondents' transfers and joint venture agreements with certain third
18 parties and compensation payments to any third parties. Respondents' failure to provide these
19 documents as required and requested in a timely manner in turn required the forensic accountant to
20 seek alternative means to establish his analysis and thus created a delay.

21 **II.**
22 **THE DIVISION IS UNDER NO DUTY TO PROVIDE A FINAL WRITTEN REPORT OR**
23 **DOCUMENT SUMMARIZING THE DIVISION'S FORENSIC ACCOUNTANT.**

24 The Division is under no administrative or statutory duty to provide to Respondents a final
25 written report or document summarizing the Division's forensic accountant's possible testimony or
26 opinion. Pursuant to Arizona Rules of Evidence, Rule 705,

1 The expert may testify in terms of opinion or inference and give reasons therefor **without**
2 **prior disclosure of the underlying facts or data, unless the court requires otherwise.**
The expert may in any event be required to disclose the underlying facts or data on cross-
examination. (*emphasis added*)

3 The Division may choose to have its forensic accountant testify solely on the underlying
4 documents he has reviewed, without ever summarizing his analysis in writing. As the Division
5 noted in its proposed list of exhibits, if any such final report or document is created by the forensic
6 accountant while he is designated as an expert, it will be produced immediately to Respondents.
7 The Respondents can not be unduly prejudiced when there is no duty or obligation by the Division
8 to provide a written report summarizing the Division's forensic accountant's possible testimony or
9 opinion.

10 **III.**
11 **THE RESPONDENTS HAVE THE ABILITY TO CONFRONT AND CROSS EXAMINE**
12 **THE DIVISION'S FORENSIC ACCOUNTANT AT THE HEARING.**

13 The Respondents are not unduly prejudiced because they have the ability to confront and
14 cross examine the Division's forensic accountant at the hearing regarding any testimony that he
15 provides before the Court. Any testimony that Respondents seek to refute can be developed on
16 cross examination. The ability to confront and cross examine the forensic accounting effectively is
17 available to Respondents since they have the ability to review and analyze all supporting
18 documents as further discussed below. In addition, Respondents can present their own expert
witness to form an opinion or otherwise, pursuant to Arizona Rules of Evidence, Rule 702.

19 **IV.**
20 **RESPONDENTS ARE NOT UNDULY PREJUDICED SINCE THEY HAVE ACCESS TO**
21 **THE UNDERLYING DOCUMENTS THAT THE FORENSIC ACCOUNTANT HAS**
22 **REVIEWED.**

23 Richey is an account holder and signatory for TCM and BLUE bank accounts and has
24 direct access to any and all bank statements evidencing his account transactions. In addition,
25 Richey has multiple means to obtain his transaction details, either by requesting such details
26 directly from the bank or reviewing his business documents related to the transaction. Furthermore,
as the Division's proposed list of exhibits states, the supporting documents reviewed by the

1 forensic accountant are available for copying or review at the Division upon request² since January
2 9, 2009. To date, no such request has been made by Respondents. The Respondents are not unduly
3 prejudiced since Richey, individually or acting on behalf of TCM or BLUE, conducted the actual
4 transactions involving investment funds which the forensic accountant is analyzing. Richey has
5 personal knowledge of who, when, and how those investment funds were disbursed or transacted
6 and thus is in better position than the forensic accountant, to analyze the investment fund
7 transactions.

8
9 **V.
CONCLUSION**

10 For the reasons stated above, the Division respectfully requests that the Respondents'
11 motion to continue the hearing be denied.

12 Respectfully submitted this 30th day of January, 2009.

13
14 By _____

Phong (Paul) Huynh

Attorney for the Securities Division of the
Arizona Corporation Commission

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26 ² Note: The Division is not and has not waived its right or requirement to redact personal identifying information, privileged or work product statements by non-experts, that are contained in any supporting document reviewed by the forensic accountant.

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 30th day of January, 2009, with

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered this
8 30th day of January, 2009, to:

9 ALJ Marc Stern
10 Arizona Corporation Commission/Hearing Division
11 1200 West Washington
12 Phoenix, AZ 85007

13 COPY of the foregoing mailed
14 this 30th day of January, 2009, to:

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20 By: Vernice Sandoval
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